UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GOLDBERG COHEN LLP,	*	**CIVIL ACTION NO.: 1:16-cv-06576**
Plaintiff,	*	
v.	*	**District Judge Naomi Reice Buchwald**
LUV N' CARE, LTD., ET AL.,	*	**Magistrate Judge James L. Cott**
Defendants.	*	**JURY TRIAL DEMANDED**

DEFENDANTS' RULE 56.1 COUNTERSTATEMENT

Defendants object to Plaintiff's Rule 56.1 statement, (doc. 33), as it does not comply with Local Rule 56.1 requiring short and concise statements of material facts as to which Plaintiff contends there is no genuine issue to be tried. Plaintiff's Rule 56.1 statement is essentially an exhibit list; sixteen of the eighteen numbered paragraphs are nothing more than a description of documents only two of which even relate to a material issue in this case. The court should note that the first 16 paragraphs of Plaintiff's Rule 56.1 refer to documents attached to Plaintiff's summary judgment motion as exhibits using the same language found in paragraphs 3 – 18 in the Declaration of Morris E. Cohen in Support of Plaintiff's Motion for Partial Summary Judgment ("Morris Dec.") (Doc. 34). Defendants submit that the Morris Dec., and not the Rule 56.1 statement, is the proper vehicle for the submission of exhibits into the record for purposes of Plaintiff's partial summary judgment motion.

The salient purpose of LR 56.1 is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001). This same rationale applies equally to spare the non-moving party from hunting through voluminous records without guidance. LR 56.1, moreover, assists the Court "in understanding the scope of the summary judgment motion by highlighting those facts which the parties contend are in dispute." *Rodriguez v. Schneider,* No. 05 CIV 4083 (RPP), 1999 U.S. Dist. LEXIS 9741, *1, n.3 (S.D.N.Y. June 29, 1999).

Defendant, as the non-moving party, is required to specifically controvert each alleged statement of material fact in Plaintiff's Rule 56.1 statement to avoid having any material fact deemed admitted for purposes of a summary judgment motion. *See* LR 56.1(c). Where Plaintiff has used the Rule 56.1 statement in an attempt to authenticate entire documents, as opposed to providing concise statements of material facts supported by citation to the evidence, LR 56.1(d), Defendant, as the non-moving party, is effectively stymied in responding to the Plaintiff's Rule 56.1 statement. Moreover, it makes it difficult to provide the court with citation to the record of controverting evidence demonstrating that a particular statement of material fact in Plaintiff's Rule 56.1 statement is disputed. While the entire document may be admissible for purposes of this summary judgment motion, the specific material facts that Plaintiff's contend are not in dispute as supported by those documents are not identified.

Many of the documents Plaintiff submits under the guise of a Rule 56.1 statement are also not relevant to the specific limited issue upon which the Court has allowed Plaintiff to seek partial summary judgment at this early stage without the benefit of discovery, i.e. whether there is an oral modification to the Retainer Agreement. Specifically, Exhibits 3 – 5 and 7 – 16 are not relevant. There is no Exhibit 6. The Court is not required to consider or rule on Rule 56.1 statements that are immaterial to the scope of the summary judgment motion. *Parks v. Lebhar-*

Friedman Inc., No. 04-7133 (DCP) (KNF), 2008 U.S. Dist. LEXIS 63019, *14 (S.D.N.Y. Aug. 11, 2008).

With the exception of paragraphs 17 and 18, Plaintiff's Rule 56.1 statement otherwise fails to comply with the letter and spirit of Rule 56.1. Faced with Plaintiff's failure to provide a Rule 56.1 statement in compliance with the rule, the Court would be justified in denying Plaintiff's summary judgment motion under LR 56.1(a) ("Failure to submit such a statement may constitute grounds for denial of the motion.") Or the Court could strike Plaintiff's Rule 56.1 statement.

In the alternative, the Court is justified in disregarding paragraphs 1 – 16 of Plaintiff's Rule 56.1 statement. *See Congregational Rabbinical College of Tartikov, Inc. v. Vill. Of Pomona*, 138 F. Supp. 3d, 352, 397 (S.D.N.Y. 2015). Although the "district court is 'not required to consider what the parties fail to point out' in their Local Rule 56.1 statements, it may in its discretion opt to 'conduct an assiduous review of the record even where one of the parties has failed to file such a statement.'" *Whitehurst v. 230 Fifth, Inc.*, 998 F. Supp. 2d 233, 260 (S.D.N.Y. 2014) (citing *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 292 (2d Cir. 2000) (striking movant's Rule 56.1 statement but electing to proceed to consider summary judgment motion).

DEFENDANTS' RULE 56.1(B) RESPONSE TO PLAINTIFF'S RULE 56.1 STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56.1(b), Defendants respond to Plaintiff's Rule 56.1 Statement of Material Facts for which Plaintiff contends there is no genuine issue to be tried.

Plaintiff's Statement of Material Fact No. 1:

Attached as Exhibit 1 to Plaintiff's Motion is a true and correct copy of an Agreement entered into between Plaintiff and Defendant on August 1, 2010. *See*, Exhibit 1; Declaration of Morris E. Cohen ("Cohen Declaration"), ¶ 3.

Response:

Defendants admit only that Exhibit 1 is a true and correct copy of the Agreement between Plaintiff and Defendants entered on August 1, 2010. Defendants contend that the Retainer Agreement reflected in Exhibit 1 is the only agreement between the parties.

Defendants' object to Plaintiff's Statement of Material Fact No. 1 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 2:

Attached as Exhibit 2 to Plaintiff's Motion is a true and correct excerpted of Luv n' care's Motion for a Permanent Injunction and Memorandum of Law in Support dated March 22, 2013 and signed by Luv n' care's General Counsel Joseph D. Guerriero ("Jackel Brief"), in connection with *Luv n' care, Ltd. v. Jackel International Ltd.*, Docket No. 10-1891 (State of Louisiana, Parish of Ouachita, Fourth Judicial District Court) ("Jackel case"). *See* Exhibit 2, Cohen Declaration, ¶ 4.

Response:

Defendants admit only that Exhibit 2 is a true and correct copy of the Jackel Brief as filed in the Jackel case. Defendants deny that the Jackel Brief constitutes an agreement or evidences an agreement, oral or otherwise, between the parties. Defendants further deny that Exhibit 2 states any terms or conditions of an alleged oral agreement between the parties or otherwise meets the requirements for an enforceable oral modification to the Agreement. Defendant further denies that the Jackel Brief constitutes an "executory agreement" as required by New York General Obligation Law § 15-301(1) sufficient to overcome the provision in the Retainer Agreement that all amendments and modifications will not be effective unless in writing and signed by both parties. *See*, Retainer Agreement, Ex. 1., ¶ 7, p. 5. Defendants further contend that Exhibit 2 was fraudulently procured by Plaintiff in an effort to perpetuate a fraud upon the Louisiana 4th District Court, the Jackel defendants and Defendants.

Defendants' object to Plaintiff's Statement of Material Fact No. 2 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 3:

Attached as Exhibit 3 to Plaintiff's Motion is a true and correct excerpted copy of the Petition (i.e. Complaint) filed by Luv '. Care's General Counsel on or about May 24, 2010 to initiate the Jackel case. *See* Exhibit 3; Cohen Declaration ¶ 5.

Response:

Defendants deny that Exhibit 3 is a true and correct copy of Plaintiff's original petition filed in the Jackel Case. At best, Exhibit 3 is a portion of the purported document. Defendants object to an excerpted document as incomplete. Defendants further deny that the petition constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion. While there is no dispute that LNC filed the Jackel case without naming Goldberg Cohen as its counsel of record, Goldberg Cohen were kept fully informed of the facts of the case, regularly advised LNC on issues involved in the Jackel Case and participated in strategic discussion in the case. In fact, at the time the parties entered into the Retainer Agreement, the Jackel case was expressly considered and made a part of the Retainer Agreement. *See* Retainer Agreement, Exhibit 1, ¶ 3.

Defendants' object to Plaintiff's Statement of Material Fact No. 3 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 4:

Attached as Exhibit 4 to Plaintiff's Motion is a true and correct of an "Amendment to Discovery" served by Joe D. Guerriero of Luv n' care on Jackel's counsel in October 2010. *See* Exhibit 3; Cohen Declaration ¶ 6.

Response:

Defendants admit only that Exhibit 4 is a true and correct copy of LNC's Amendment to Discovery in the Jackel Case. Defendants deny that the Amendment to Discovery constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion. The Amendment to Discovery was submitted to amend a prior discovery response identifying those products LNC contended at that time were being sold in violation of LNC's agreement with Jackel. Defendants contend that when Goldberg Cohen became lead counsel in the Jackel Case, they had a duty to review and become familiar with all the pleadings and discovery previously filed in the case. Defendants contend that Goldberg Cohen failed in their duty to review and become familiar with all the pleadings and discovery previously filed in the case. Defendants also contend that when Goldberg Cohen became lead counsel in the Jackel Case, they had a duty to investigate the facts of the case. Defendants contend that Goldberg Cohen failed in their duty to investigate the facts of the Jackel Case in that they failed to identify cups that clearly violated LNC's agreement with Jackel.

Defendants' object to Plaintiff's Statement of Material Fact No. 4 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 5:

Attached as Exhibit 5 to Plaintiff's Motion is a true and correct of the judgment filed May 22, 2013, and entered in the Jackel case. *See* Exhibit 5; Cohen Declaration ¶ 7.

Response:

Defendants admit only that Exhibit 5 is a true and correct copy of the Judgment entered in the Jackel Case. Defendants deny that the judgment constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 5 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 6:

Attached as Exhibit 7 to Plaintiff's Motion are true and correct copies of an appellate decision in an appeal handled by Plaintiff GC in the Jackel case. *See* Exhibit 7; Cohen Declaration ¶ 8.

Response:

Defendants note that Exhibit 6 appears to be omitted. Defendants admit only that Exhibit 7 is a true and correct copy of an Appellate Decision in the Jackel case. Defendants deny that the Appellate Decision constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 6 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 7:

Attached as Exhibit 8 to Plaintiff's Motion is a true and correct copy of a brief prepared by Plaintiff GC in an appeal to the Supreme Court of Louisiana in the Jackel case. *See* Exhibit 8; Cohen Declaration ¶ 9.

Response:

Defendants admit only that Exhibit 8 "is a true and correct copy of a brief prepared by Plaintiff Goldberg Cohen in an appeal to the Supreme court of Louisiana in the Jackel case." Defendants deny that the brief constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 7 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 8:

Attached as Exhibit 9 to Plaintiff's Motion are true and correct copy [sic] of decisions entered by the Supreme Court of Louisiana in the Jackel case. *See* Exhibit 9; Cohen Declaration ¶ 10.

Response:

Defendants admit only that Exhibit 9 is true and correct copies "of decisions entered by the Supreme Court of Louisiana in the Jackel case." Defendants deny that the Louisiana Supreme Court decisions constitute material facts or relate to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 9 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 9:

Attached as Exhibit 10 to Plaintiff's Motion is a true and correct copy of an appeal filed by Jackel in the Jackel case, which was being defended against by Plaintiff GC. *See* Exhibit 10; Cohen Declaration ¶ 11.

Response:

Defendants admit only that Exhibit 10 "is a true and correct copy of an appeal filed by Jackel in the Jackel case, which was being defended against by Plaintiff Goldberg Cohen." Defendants deny that the appeal filed by Jackel constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 9 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 10:

Attached as Exhibit 11 to Plaintiff's Motion is a true and correct copy of an appeal filed by LNC in the Jackel case, which was being handled by Plaintiff GC. *See* Exhibit 11; Cohen Declaration ¶ 12.

Response:

Defendants admit only that Exhibit 11 "is a true and correct copy of an appeal filed by LNC in the Jackel case, which was being handled by Plaintiff Goldberg Cohen." Defendants deny that the appeal filed by LNC constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 10 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Plaintiff's Statement of Material Fact No. 11:

Attached as Exhibit 12 to Plaintiff's Motion is a true and correct copy of a Declaration and exhibits (excerpted) of James Grant, counsel for Jackel in the Jackel case, filed in the case of *Luv n' care, Ltd. and Admar International, Inc. v. Jackel International Limited and Mayborn USA, Inc.*, 2:14-cv-00855-JRG (E.D. Texas) ("the Texas case"). *See* Exhibit 12; Cohen Declaration ¶ 13.

Response:

Defendants deny that Exhibit 12 is a true and correct copy of the Declaration filed by James Grant in the Texas case. At best, Exhibit 12 is a portion of the purported document. Defendants object to an excerpted document as incomplete. Defendants deny that the

Declaration filed by James Grant in the Texas case constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants object to Plaintiff's Statement of Material Fact No. 11 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Defendants further object to this exhibit as not relevant to the limited scope of the motion for partial summary judgment permitted by the court at this early stage of this action without the benefit of discovery. Specifically, Plaintiff's did not receive permission from the Court at the January 19, 2017 pre-motion conference to seek partial summary judgment on the issue of Plaintiff's malpractice committed in the Jackel case to which Exhibit 12 is directed.

Plaintiff's Statement of Material Fact No. 12:

Attached as Exhibit 13 to Plaintiff's Motion is a true and correct copy of an Opposition to Motion to Dismiss and exhibits (excerpted) filed by Luv n' care in the Texas case, and signed by Luv n' care's in-house IP Litigation Counsel. *See* Exhibit 13.

Response:

Defendants deny that Exhibit 13 is a true and correct copy of LNC's Opposition to Motion to Dismiss filed in the Texas Case. At best Exhibit 13 is a portion of the purported document. Defendants object to an excerpted document as incomplete. Defendants deny that LNC's Opposition to the Motion to Dismiss constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 12 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Defendants further object to this Exhibit 13 as not relevant to the limited scope of the motion for partial summary judgment permitted by the court at this early stage of this action without the benefit of discovery. Specifically, Plaintiff's did not receive permission from the Court at the January 19, 2017 pre-motion conference to seek partial summary judgment on the issue of Plaintiff's malpractice committed in the Jackel case to which Exhibit 13 is directed.

Plaintiff's Statement of Material Fact No. 13:

Attached as Exhibit 14 to Plaintiff's Motion is a demonstrative exhibit bringing together true and correct copies of documents each labeled "Exhibit 6" from Exhibits 3, 4, and 13 above. *See* Exhibit 14; Cohen Declaration ¶ 15.

Response:

Defendants admit only that Exhibit 14 is a true and correct copy of a demonstrative exhibit bringing together Exhibits 3, 4 and 13 filed in the Texas case. Defendants deny that the demonstrative exhibit constitute a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 13 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Defendants further object to Exhibit 14 as not relevant to the limited scope of the motion for partial summary judgment permitted by the court at this early stage of this action without the benefit of discovery. Specifically, Plaintiff's did not receive permission from the Court at the January 19, 2017 pre-motion conference to seek partial summary judgment on the issue of Plaintiff's malpractice committed in the Jackel case to which Exhibit 14 is directed.

Plaintiff's Statement of Material Fact No. 14:

Attached as Exhibit 15 to Plaintiff's Motion is a true and correct copy of a Memorandum and Order issued by the Court in the Texas case (Dkt. 95). *See* Exhibit 15; Cohen Declaration ¶ 16.

Response:

Defendants admit only that Exhibit 15 "is a true and correct copy of a Memorandum and Order issued by the Court in the Texas case." Defendants deny that the Memorandum and Order constitute a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 14 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a).

Defendants further object to Exhibit 15 as not relevant to the limited scope of the motion for partial summary judgment permitted by the court at this early stage of this action without the benefit of discovery. Specifically, Plaintiff's did not receive permission from the Court at the January 19, 2017 pre-motion conference to seek partial summary judgment on the issue of Plaintiff's malpractice committed in the Jackel case to which Exhibit 15 is directed.

Plaintiff's Statement of Material Fact No. 15:

Attached as Exhibit 16 to Plaintiff's Motion is a true and correct copy of a transcript from a pre-motion conference held on January 19, 2017 in the present case. *See* Exhibit 16; Cohen Declaration ¶ 17.

Response:

Defendants admit only that Exhibit 16 "is a true and correct copy of a transcript from a pre-motion conference held on January 19, 2017 in the present case." Defendants deny that the transcript constitutes a material fact or relates to a genuine issue to be tried relevant to Plaintiff's Motion.

Defendants' object to Plaintiff's Statement of Material Fact No. 14 as failing to provide a "short and concise statement...of the material facts as to which the moving party contends there is no genuine issue to be tried" as required by LR 56.1(a). Defendants' further object to Exhibit 16 to the extent Plaintiff's seek to rely on comments made by the Court during the pre-motion conference as supporting material facts or representing definitive rulings on the merits of any of the issues addressed during the pre-motion conference including, but not limited to, the Court's comments on the action or inaction of LNC's General Counsel, Joseph D. Guerriero in the Jackel case.

Plaintiff's Statement of Material Fact No. 16:

Attached as Exhibit 17 to Plaintiff's Motion is a spreadsheet that accurately lists the weekly payments by LNC to GC from after March 22, 2013 until LNC ceased making those payments, and further including an accurate monthly summary of the same, and accurate calculations as to the same. *See* Exhibit 17; Cohen Declaration ¶ 18.

Response:

Defendants deny that Exhibit 17 accurately lists the weekly payments by LNC to Goldberg Cohen. Defendants' further deny that there has been any modification to the Retainer Agreement, Exhibit 1, supporting Exhibit 17's credit of half of the weekly payments to the Jackel case. LNC's weekly payments made under the Retainer Agreement are provided as Exhibit A-1 to the Hakim Declaration ("Hakim Dec.") *See* Hakim Dec., ¶ 17, Ex. A-1.

Plaintiff's Statement of Material Fact No. 17:

In connection with the Jackel case, once the case was settled Jackel sent its settlement payment to GC. Upon discussions between LNC and GC. LNC consented to release to GC a contingency fee of 15% after deduction of LNC's costs, but refused to pay GC a contingency fee of 20%. Cohen Declaration ¶ 19; Declaration of Lee A. Goldberg ("Goldberg Declaration") ¶ 3.

Response:

Defendants admit only that LNC consented to releasing 15% of the Jackel settlement payment to Goldberg Cohen in accordance with the Retainer Agreement. *See* Exhibit 1. Defendants deny that they had any obligation to pay Goldberg Cohen more than 15% of the Jackel settlement payment as a contingent fee. Defendants further contend that Goldberg Cohen has been fully paid for all work done by Goldberg Cohen in the Jackel case pursuant to the terms of the Retainer Agreement. Defendants further deny that there is any other agreement between the parties regarding fees to be paid for services in the Jackel case or any other case handled by Goldberg Cohen and, therefore, there can be no breach of a nonexistent agreement.

Plaintiff's Statement of Material Fact No. 18:

A payment of 15% for a contingency fee was released by LNC in December 2013. The disputed 5% of the contingency fee is $80,000, which amount was placed by GC in its escrow account pending resolution of the dispute between GC and LNC. Cohen Declaration ¶ 18 [sic - ¶ 20]; Declaration of Lee A. Goldberg ("Goldberg Declaration") ¶ 4.

Response:

Defendants admit that Goldberg Cohen received 15% of the Jackel settlement payment in accordance with the parties' Retainer Agreement. *See* Exhibit 1. Defendants also admit that Goldberg Cohen withheld $80,000.00 which was 5% of the Jackel settlement payment. Defendants have no information or knowledge as to whether Goldberg Cohen has held the $80,000.00 in an escrow account.

Defendants deny that they had any obligation to pay Goldberg Cohen an additional 5% of the Jackel settlement payment as a further contingent fee. Defendants contend that Goldberg Cohen wrongfully and improperly withheld $80,000 in violation of the Retainer Agreement. Defendants further contend that Goldberg Cohen has been fully performed and paid for all work done by Goldberg Cohen in the Jackel Case pursuant to the terms of the Retainer Agreement and that the $80,000 wrongfully withheld by Goldberg Cohen belongs to LNC. Defendants further deny that there is any other agreement between the parties regarding any increase in the 15% contingency fee provided in the Retainer Agreement for services in the Jackel case or any other case handled by Goldberg Cohen and, therefore, there can be no breach of a nonexistent agreement.

DEFENDANTS' COUNTERSTATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to LR 56.1(b) and in reliance upon the Court's ruling at the January 19, 2017 pre-motion conference, Defendants provide the following valid statement of additional material facts as to which there exists a genuine issue to be tried.

1. There was no amendment or modification, oral or written, of the Retainer Agreement. *See* Retainer Agreement, Ex. 1.

In response to the actual scope of Plaintiff's partial summary judgment motion which exceeds the permissible scope of the partial summary judgment allowed by the Court at the January 19, 2017 pre-motion conference, the following statements of additional material facts to which there exist a genuine issue to be tried (and to which Defendants object as exceeding the limited scope of the partial summary judgment allowed at the pre-motion conference) are:

2. Defendants do not owe Plaintiff Goldberg Cohen any additional compensation under the Retainer Agreement or any alleged modification thereof.

3. Plaintiff Goldberg Cohen has committed legal malpractice in the Jackel Case while representing Defendants under the Retainer Agreement entitling Defendants to equitable recoupment against any additional fees allegedly owed under the Retainer Agreement or any alleged modification thereof.

4. Plaintiff Goldberg Cohen has committed legal malpractice in other actions while representing Defendants under the Retainer Agreement entitling Defendants to equitable recoupment against any additional fees allegedly owed under the Retainer Agreement or any alleged modification thereof.

5. Defendants counterclaims are not barred by the application of res judicata.

DEFENDANTS' RULE 56.1(B) COUNTERSTATEMENT
OF UNDISPUTED MATERIAL FACTS

1. During the entire time Morris Cohen, Lee Goldberg and Plaintiff Goldberg Cohen represented Defendants LNC and Admar, Nouri E. (Eddie) Hakim has been Defendant LNC's CEO and Defendant Admar's President. Hakim Dec., ¶ 1.

2. Morris Cohen has represented Defendants in intellectual property matters since the '90's. Hakim Dec., ¶ 2.

3. In the summer of 2010, Morris Cohen informed Mr. Hakim that he was partnering with Lee Goldberg and asked "whether they could represent LNC and Admar in intellectual property matters under a hybrid fee arrangement" involving "a fixed weekly amount and a success fee contingent on the outcome of the various matters they handled for LNC and Admar." Hakim Dec., ¶ 2.

4. Morris Cohen and Lee Goldberg proposed a written Retainer Agreement that Mr. Hakim solely negotiated with Plaintiff Goldberg Cohen on behalf of Defendants LNC and Admar. Hakim Dec., ¶¶ 2 and 3.

5. During the negotiations with Plaintiff Goldberg Cohen over the Retainer Agreement, "LNC was the victim of a number of infringements involving LNC's and Admar's intellectual property" and one of the goals of the Retainer Agreement was that Plaintiff Goldberg Cohen "would handle all the intellectual property matters for LNC and Admar including patent

and trademark prosecution, general intellectual property counseling and advice, and intellectual property litigation." Hakim Dec., ¶ 3.

6. Plaintiff and Defendants LNC entered into the Retainer Agreement on August 1, 2010. *See* Retainer Agreement, Ex. 1, p. 1.; Hakim Dec., ¶ 3; Guerriero Declaration ("Guerriero Dec."), ¶ 4.

7. The Retainer Agreement was drafted by Plaintiff Goldberg Cohen. Hakim Dec., ¶ 3.

8. Section 7 of the Retainer Agreement, under the heading "Entire Agreement," was drafted by Plaintiff Goldberg Cohen and provides, in relevant part, that "[n]o amendment or modification will be effective unless set forth in writing and signed on Your behalf and GC." Retainer Agreement, § 7, p. 5; Hakim Dec., ¶ 3 ("The 'no amendment or modification' provision in the written Retainer Agreement was drafted by Goldberg Cohen.")

9. The Retainer Agreement is an integrated contract. *See* Retainer Agreement, Ex. 1, § 7, p. 5.

10. The parties never entered into a written amendment or modification of the Retainer Agreement. Hakim Dec., ¶ 13.

11. The parties never entered into an oral amendment or modification of the Retainer Agreement. Hakim Dec., ¶ 13.

12. The "key terms" of the Retainer Agreement provided that Plaintiff Goldberg Cohen "would exclusively handle LNC and Admar's intellectual property matters and would receive a weekly fee in the amount of $8,653.85, capped at $1.25 million, and contingent fee amounts, expressed as varying percentages, from the recovery of the various litigations handled

by Goldberg Cohen." Hakim Dec., ¶ 3; Guerriero Dec., ¶ 4. *See* Retainer Agreement, Ex. 1, § 3, p. 2.

13. "The fixed fee was for all legal services performed by Goldberg Cohen and was not allocated to any specific service" or "specific case and Goldberg Cohen never sent LNC an invoice or other time record allocating any of the weekly fixed fee, or advances, to the Jackel Case or any other case or matter they handled." Hakim Dec., ¶¶ 3 and 12.

14. Under the Retainer Agreement, it was "expected that most of Goldberg Cohen's fees would be earned from contingent fee recoveries." Hakim Dec., ¶ 3.

15. Exhibit A-1 attached to the Hakim Dec. is a weekly payment history to Plaintiff Goldberg Cohen under the Retainer Agreement. Hakim Dec., ¶ 17.

16. The first weekly retainer fee of $8,653.85 under the Retainer Agreement was paid on August 6, 2010. Hakim Dec., ¶ 17 and Ex. A-1.

17. Plaintiff Goldberg Cohen prepared and filed the action styled *Luv n' care, Ltd. and Admar International, Inc. v. Mayborn USA, Inc.*, United States District Court for the Southern District of New York, Civil Action No. 11-cv-2460 (the "Mayborn Case") on April 11, 2011. *See* Complaint (Doc. No. 1) filed in the Mayborn Action and Complaint (Doc. No. 1), ¶ 43, filed in this action.

18. The Defendant Mayborn USA, Inc. in the Mayborn Action is an affiliate of Jackel. Complaint (Doc. No. 1), ¶ 43.

19. At the time of the April 11, 2011 filing of the Mayborn Action, Plaintiff Goldberg Cohen was receiving the weekly payment of $8,653,85 under the terms of the Retainer Agreement. *See* Hakim Dec., Ex. A-1.

20. Defendant LNC made a weekly payment of $8,653.85 to Plaintiff under the Retainer Agreement for the period August 6, 2010 thru March 30, 2012 for a total payment of $752,884.95 in weekly fees. *See* Hakim Dec., ¶ 17 and Ex. A-1.

21. During the period from April 11, 2011 thru March 30, 2012, Plaintiff's work on the Mayborn Action was included within the weekly payment of $8,653.85. *See* Hakim Dec., Ex. A-1.

22. On April 6, 2012, Defendant LNC increased the weekly payment by $4,346.14 to $12,999.99 with the additional $4,346.14 representing "an advance against earned fees." *See* Hakim Dec., ¶ 17 and Ex. A-1.

23. Defendant LNC paid a weekly retainer of $12,999.99 to Plaintiff Goldberg Cohen for the period April 6, 2012 thru February 8, 2013 and, over the course of this 45 week period, paid "$389,423.15 in weekly fixed fees and advanced $195,576.30 against earned fees." *See* Hakim Dec., ¶ 17 and Ex. A-1.

24. On February 15, 2013, Defendant LNC "again increased the weekly payments by $3,730.01 to $16,730" with the additional $3,730.01 over the previous advance of $4,346.14 "as an additional advance against earned fees." *See* Hakim Dec., ¶ 17 and Ex. A-1.

25. On May 10, 2013, Plaintiff Goldberg Cohen "hit the $1.25 million cap set out in the Retainer Agreement." Hakim Dec., ¶ 17.

26. All weekly payments after May 10, 2013 "were advances against earned fees." Hakim Dec., ¶ 17.

27. For the period "February 15, 2013 to May 10, 2013, LNC advanced Goldberg Cohen $109,798.20" which, over the 32 weeks, represented a total advance of $535,360.00. Hakim Dec., ¶ 17.

28. "After May 10, 2013, LNC continued the weekly advances of $16,730.00 for 32 weeks, until December 20, 2013, for a total of $535,360.00." Hakim Dec., ¶ 17 and Ex. A-1.

29. Over the course of 32 weeks, "LNC advanced Goldberg Cohen $862,648.20 against earned fees." Hakim Dec., ¶ 17.

30. Defendant LNC reduced the weekly payment to $8,653.85 on December 27, 2013 and continued payments at this rate for 30 weeks, until July 18, 2014, "for an additional advance of $259,615.50. Hakim Dec., ¶ 17 and Ex. A-1.

31. "Over the course of the entire Retainer Agreement, LNC advanced Goldberg Cohen $1,100,350.00." Hakim Dec., ¶ 17 and Ex. A-1.

32. The total amount of weekly payments made under the Retainer Agreement, including advances against earned fees, does not include contingency fees paid to Plaintiff Goldberg Cohen earned on various cases. Hakim Dec., ¶ 17.

33. "To date, Goldberg Cohen has not repaid those advances." Hakim Dec., ¶ 17.

34. Luv n' care's Memorandum of Law in Support of its Motion for a Permanent Injunction, Ex. 2, does not comply with the requirements for an effective modification or amendment of the Retainer Agreement as provided in Section 7. *See* Retainer Agreement, Ex. 1, § 7, p. 5.

35. Prior to entry of the Judgement in the Jackel case, the parties stipulated to reasonable attorneys' fees for violation of the Louisiana Unfair Trade Practices Act in the amount of $500,000. *See* Ex. 5. (Reasons for Judgment dated May 22, 2013).

36. The Jackel case, filed in Louisiana State Court on May 24, 2010, is listed in the Retainer Agreement and was filed initially by Defendants long time counsel, Joe D. Guerriero. Hakim Dec., ¶¶ 4 and 5. *See* Retainer Agreement, Ex. 1, § 3, p. 2.

37. In entering into the Retainer Agreement, the parties "fully expected that Goldberg Cohen would become lead counsel in the Jackel Case." Hakim Dec., ¶ 5.

38. Morris Cohen and Lee Goldberg, of Plaintiff Goldberg Cohen, were admitted *pro hac vice* and brought on as lead counsel to litigate the Jackel case for Defendant LNC in November 2010. *See* Complaint (doc. 1), ¶¶ 30 and 34; Guerriero Dec., ¶ 5.

39. Before making their appearance as lead counsel for Defendant LNC in the Jackel case, Plaintiff Goldberg Cohen "were kept informed of the case and were involved in discussions relating to case strategy." Hakim Dec., ¶ 5; Guerriero Dec., ¶ 5.

40. Before the filing of the Jackel case, Mr. Guerriero sent Plaintiff Goldberg Cohen a draft of the Petition to be filed with the Court for review and comments. Guerriero Dec., ¶ 7.

41. After their appearance in the Jackel case, Mr. Guerriero provided Plaintiff Goldberg Cohen with "copies of all the pleadings and papers filed with the court and all documents exchanged by the parties" and was "given full access to all of LNC's internal communications" including Mr. Guerriero's "notes and opinions." Guerriero Dec., ¶ 7.

42. As lead counsel in the Jackel case, Plaintiff Goldberg Cohen was "given full authority to manage the case as they saw fit working directly with LNC's CEO, Eddie Hakim." Guerriero Dec. 7.

43. With Plaintiff Goldberg Cohen as Defendant LNC's lead counsel in the Jackel case, Mr. Guerriero "played a relatively small role in the case moving forward" with his role "basically reduced to that of local counsel" meaning that Mr. Guerriero "reviewed documents for compliance with the court's local rules and saw to their filing." Guerriero Dec., ¶¶ 6 – 7; Hakim Dec., ¶ 5.

44. The rules of the Louisiana State Court require that Mr. Guerriero, as Defendant LNC's local counsel, "sign all documents filed with the Court." Guerriero Dec., ¶ 7.

45. "At the time the Jackel case was filed, Jackel was selling two lines of cups a soft top line and a hard-top line" with the hard-top line "known as the Explora line." Hakim Dec., ¶ 6.

46. Defendant LNC's investigation at the time of filing the Jackel case was based upon an examination of photographs of various Jackel products which confirmed that "the soft top cup products violated LNC and Admar's intellectual property." Hakim Dec., ¶ 6.

47. Inspection of photographs of Jackel's hard-top cup products, while not clear, appeared to show that the Explora line included a compression valve. Hakim Dec., ¶ 6; Guerriero Dec., ¶ 9.

48. In response to an inquiry from opposing counsel "as to why LNC had identified the hard-top cup as an infringing product as it did not have a compression valve," Eddie Hakim obtained a sample of Jackel's Explora hard-top cups "depicted on Jackel's website and confirmed that it did not include a compression valve" and based upon the representations of Jackel's counsel and examination of the Explora hard-top cup, this product was dropped from the Jackel case. Hakim Dec., ¶ 6; Guerriero Dec., ¶ 9.

49. Upon taking over the Jackel case, Plaintiff Goldberg Cohen was aware of Defendant LNC's understanding that Jackel's Explora line of hard-top cups did not include the accused compression valve. Guerriero Dec., ¶ 9.

50. Defendant LNC would not have dropped Jackel's Explora hard-top cups from the list of accused products in the Jackel case if it had known that there were Explora hard-top cups in existence that actually contained the accused compression valve. Guerriero Dec., ¶ 9.

51. In the Jackel case, Lee Goldberg took the deposition of Jackel's lead designer, Ilan Sampson. Hakim Dec., ¶ 8; Guerriero Dec., ¶ 10.

52. During the deposition, Mr. Samson revealed to Lee Goldberg that the Jackel Explora line of hard-top products included a compression valve. Hakim Dec., ¶ 8; Guerriero Dec., ¶ 10.

53. Shortly after the Sampson deposition, and with trial of the Jackel case still some seventeen (17) months away, Mr. Hakim "discussed with Goldberg Cohen about the need to include the Explora line of products in the suit." Hakim Dec., ¶ 8.

54. At the time of the discussion with Plaintiff Goldberg Cohen after the Sampson deposition, Plaintiff Goldberg Cohen told Eddie Hakim "that they could add the Explora line products later in the case." Hakim Dec., ¶ 8.

55. As the Jackel case progressed, Eddie Hakim "inquired on a regular basis about adding the Explora products and was regularly assured that they would be added." Hakim Dec., ¶ 8.

56. As the time for trial of the Jackel case got closer, Eddie Hakim "became more concerned that the Explora products were not part of the case." Hakim Dec., ¶ 8; Guerriero Dec., ¶ 11.

57. Plaintiff Goldberg Cohen informed Eddie Hakim "that as an alternative to bringing the Explora line into the case, LNC could seek damages in a later filed case, as they put it, we could get 'two bites at the apple.'" Hakim Dec., ¶ 8.

58. Eddie Hakim did not agree with Plaintiff Goldberg Cohen's alternative approach and "instructed Goldberg Cohen to add the Explora line products to the Jackel Case" and "assumed" Plaintiff Goldberg Cohen followed his instruction. Hakim Dec., ¶ 8.

59. During final preparations for the trial in the Jackel case, Eddie Hakim "learned that Goldberg Cohen had not added the Explora products" and "became irate and demanded that Goldberg Cohen take immediate steps to include the Explora products in the Jackel Case." Hakim Dec., ¶ 9; Guerriero Dec., ¶ 11.

60. Plaintiff Goldberg Cohen, on the next day, "filed a motion seeking to obtain the sales figures for the Explora products, but that motion was denied and the sales figures for the Explora products were not included in the trial of the Jackel Case." Hakim Dec.; ¶ 10; Guerriero Dec., ¶ 11.

61. After denial of the motion, Plaintiff Goldberg Cohen continued to assure Eddie Hakim "that LNC could file a second case against Jackel and be awarded damages for the Explora products" which was ultimately proven wrong when "LNC was unable to obtain damages for the Explora products for the reason that those damages should have been claimed in the Jackel Case." Hakim Dec., ¶ 10; Guerriero Dec., ¶ 12.

62. Defendants lost millions of dollars in damages as a result of being unable to include the Explora line in the Jackel case which would have been obtained either in the jury award or the subsequent settlement with Jackel. Hakim Dec., ¶ 10.

63. After the jury verdict in the Jackel case, Eddie Hakim discussed the issue of recovery of attorneys' fees with Plaintiff Goldberg Cohen and, while being informed that attorneys' fees are "generally based on the hour and tasks expended on a matter," learned that because Plaintiff Goldberg Cohen "did not keep track of their time or the tasks expended in the Jackel Case they would have to make some alternative showing." Hakim Dec., ¶ 12; Guerriero Dec. ¶ 21.

64. Plaintiff Goldberg Cohen informed Eddie Hakim that an award of attorneys' fees is based on a reasonable attorneys' fee and not "on the actual fees." Hakim Dec., ¶ 12.

65. Arguing that the fees in the Retainer Agreement were too low, Plaintiff Goldberg Cohen recommended "presenting the Court with an enhanced fee proposal" involving an "enhanced hybrid of fixed and contingent fees and not limited solely to hourly fees." Hakim Dec., ¶ 12.

66. Assured by Plaintiff Goldberg Cohen that it was permissible to seek "reasonable and not actual fees." Eddie Hakim told Plaintiff Goldberg Cohen that "they could do whatever they thought was permissible in their professional judgment." Hakim Dec., ¶ 12.

67. Eddie Hakim did not "authorize or instruct Goldberg Cohen to misrepresent any facts to either Jackel of the Louisiana State Court" and did not review the brief on the attorneys' fees at the time it was filed relying upon Plaintiff Goldberg Cohen "to act professionally." Hakim Dec., ¶ 12.

68. Eddie Hakim later learned that Plaintiff Goldberg Cohen had submitted a brief "wrongly requesting actual attorneys' fees instead of a reasonable amount and stating that they had an oral amendment to the written Retainer Agreement." Hakim Dec., ¶ 12.

69. Eddie Hakim "never agreed to any amendment to the Retainer Agreement, oral or otherwise." Hakim Dec., ¶ 13.

70. Eddie Hakim "never agreed to increase Goldberg Cohen's weekly fee amount specified in the Retainer Agreement." Hakim Dec., ¶ 13.

71. Eddie Hakim "never agreed to increase the contingent fee percentages in the Retainer Agreement." Hakim Dec., ¶ 13.

72. Eddie Hakim "expressly advised Goldberg Cohen that the additional amounts that were being sent to them in excess of the amount set forth in the written Retainer Agreement were advances of future fees they might earn on cases they were or would be handling." Hakim Dec., ¶ 13.

73. Eddie Hakim was "the only person at LNC and Admar that had authority to negotiate with Goldberg Cohen regarding the Retainer Agreement or any other fee arrangement." Hakim Dec., ¶ 13.

74. Mr. Guerriero "had not participated in negotiating the fees in the Retainer Agreement and had no authority to amend that Retainer Agreement." Hakim Dec., ¶ 13; Guerriero Dec., ¶¶ 14 and 15.

75. Morris Cohen, Eddie Hakim's nephew, "had represented LNC for almost 20 years and knew full well that I [Eddie Hakim] was the only person with authority to negotiate fees on behalf of LNC and Admar." Hakim Dec., ¶ 13.

76. While mentioning to Mr. Guerriero that he was involved in discussions with Plaintiff Goldberg Cohen "regarding the attorneys' fees issue," Eddie Hakim did not discuss the matter further with Mr. Guerriero "until after the Jackel Case was settled and Goldberg Cohen withheld 5% of the Jackel settlement amounting to $80,000.00." Hakim Dec., ¶ 13; Guerriero Dec., ¶ 18.

77. Following Plaintiff Goldberg Cohen's withholding of $80,000 from the Jackel settlement, Eddie Hakim first learned that Plaintiff Goldberg Cohen was relying on statements in the brief signed by Mr. Guerriero "containing the language of the alleged modification of the written Retainer Agreement" as the basis for keeping 20% of the Jackel settlement. Hakim Dec., ¶ 14.

78. In response, Eddie Hakim told Plaintiff Goldberg Cohen that "they knew there was no oral amendment to the Retainer Agreement." Hakim Dec., ¶ 14.

79. Despite a number of telephone conversations between Eddie Hakim and Plaintiff Goldberg Cohen during the period from October 28, 2013 through November 19, 2013 regarding the improper retention of the $80,000, Plaintiff Goldberg Cohen never made "a claim to any weekly fees advanced by LNC" with all of the discussion solely concerning the withheld $80,000.00. Hakim Dec., ¶ 14; Guerriero Dec., ¶ 21.

80. "At no time have Goldberg Cohen ever made an oral or written claim to any of the weekly fees advanced by LNC until they filed the counterclaim in the first Goldberg Cohen case." Hakim Dec., ¶ 14.

81. While representing Defendants under the Retainer Agreement, Plaintiff Goldberg Cohen requested that Defendants advance additional amounts "in the form of additional weekly payments" claiming that the advances were needed "to cover the additional trial expenses" and Defendants "made two increases in the weekly payments." Hakim Dec., ¶ 16.

82. "The first advance payment was made on April 6, 2012 in response to Goldberg Cohen's request made in connection with the Regent Baby Case which was set for trial on April 23, 2012." Hakim Dec., ¶ 16.

83. There has been no recovery in the Regent Baby Case. Hakim Dec., ¶ 16.

84. "The second increase was made on February 15, 2013 during trial of the Jackel Case" in response to Plaintiff Goldberg Cohen's explanation that they "needed additional legal and support staff and the advances would help them 'keep the team together.'" Hakim Dec., ¶ 16.

85. "At no time did the parties amend the written Retainer Agreement as there was no need since the additional payments were merely advances against the expected contingent fees they would earn." Hakim Dec., ¶ 16.

86. Plaintiff Goldberg Cohen solely prepared a Petition which was forwarded to Mr. Guerriero for filing in the Louisiana State District Court in an action commonly referred to as Jackel II seeking to recover damages for Jackel's sale of the Explora line of hard-top cups with the accused compression valve. Guerriero Dec., ¶¶ 12 – 13; Hakim Dec., ¶¶ 14 – 15.

87. While Jackel had raised res judicata, Plaintiff Goldberg Cohen opined that res judicata would not bar the Jackel II lawsuit. Guerriero Dec., ¶ 13.

88. The Jackel II case was removed to the U.S. District Court for the Western District of Louisiana and was dismissed thereafter due to a settlement reached between Jackel and Defendant LNC. Guerriero Dec., ¶ 12.

89. Following the trial of the Jackel case, on behalf of Defendant LNC, Plaintiff Goldberg Cohen sought an award of attorneys' fees in conjunction with a request for a permanent injunction. Guerriero Dec., ¶ 14.

90. The content of the brief submitted in the Jackel case requesting entry of a permanent injunction and also seeking an award of attorneys' fees was prepared solely by Plaintiff Goldberg Cohen. Guerriero Dec., ¶ 14. *See* Ex. 2.

91. Well after the close of business and after Mr. Guerriero had left work for the day, Plaintiff Goldberg Cohen sent Mr. Guerriero a draft of the brief seeking a permanent injunction and an award of attorneys' fees on the evening just before the brief was due to be filed with the Court by 4:30 p.m. the next day. Guerriero Dec., ¶ 14.

92. Mr. Guerriero did not see the draft brief until he arrived at the office at 9:00 a.m. on the day the brief had to be filed with the Court. Guerriero Dec., ¶ 14.

93. The bulk of the brief requested an award of a permanent injunction although there was a section on what attorneys' fees should be awarded. Guerriero Dec., ¶ 14.

94. At the time of Mr. Guerriero's review of the draft brief, he had no reason to doubt the accuracy of the fee discussion. Guerriero Dec., ¶ 14.

95. Facing a 4:30 p.m. filing deadline, a great deal of time was spent by both Mr. Guerriero's and his legal assistant in getting the brief properly formatted for filing with the Court with Mr. Guerriero devoting the majority of his time on reviewing the injunction argument. Guerriero Dec., ¶ 14.

96. As a result of the rushed nature of the filing caused solely by Plaintiff Goldberg Cohen, Mr. Guerriero did not concentrate on the attorneys' fee portion of the brief. Guerriero Dec., ¶ 14.

97. When Mr. Guerriero first learned from Plaintiff Goldberg Cohen about an agreement with Eddie Hakim to amend their fee agreement, he had no reason to doubt their factual representations and relied upon Plaintiff Goldberg Cohen's fiduciary relationship to Defendant LNC and personal trust that Plaintiff Goldberg Cohen would be candid and tell the truth. Guerriero Dec., ¶ 15; Hakim Dec., ¶ 14.

98. Following the filing of the brief, the parties in the Jackel case reached a stipulation that $500,000 represented a reasonable attorneys' fee and all issues raised in the briefing on the attorneys' fee issue became moot. Guerriero Dec., ¶ 16. *See*, Ex. 5 (Reasons for Judgment).

99. The language in the brief filed on the attorneys' fee issue in the Jackel case had been inserted by Plaintiff Goldberg Cohen "in an effort to enhance the amount of the attorneys' fees and potential recovery from Jackel." Guerriero Dec., ¶ 18.

100. The settlement payment by Jackel was wired to Plaintiff Goldberg Cohen. Guerriero Dec., ¶ 19.

101. When it came time to disburse the funds, Plaintiff Goldberg Cohen claimed 20% of the recovery but made no mention whatsoever of any additional amounts due and owing for work performed on the Jackel case to Mr. Guerriero either in writing or orally. Guerriero Dec., ¶ 19.

102. After the parties stipulated to the amount of a reasonable attorneys' fee in the Jackel case, the Court never had to decide the attorneys' fee issue and the case thereafter was settled with Jackel. Guerriero Dec., ¶ 21.

103. With the stipulation resolving the amount of a reasonable attorneys' fee in the Jackel case which mooted the issue, the entry of Judgment in the Jackel Case and the subsequent settlement with Jackel, Mr. Guerriero had no reason to bring the erroneous information prepared by Plaintiff Goldberg Cohen in the brief on the attorneys' fees to the Court's attention. Guerriero Dec., ¶ 21; Hakim Dec., ¶ 15.

104. The Mayborn Action was an extension of the Jackel Case included in the Retainer Agreement. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

105. Although Mayborn was the parent company of Jackel, Defendant LNC's distribution agreement involved in the Jackel Case was with Jackel. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

106. Although Defendant LNC considered Jackel and Mayborn to constitute a single business enterprise, Defendant LNC only sued Jackel in Louisiana State Court due to the lack of sufficient information supporting jurisdiction over Mayborn in the Jackel Case. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

107. While serving as lead counsel in the Jackel Case, Plaintiff Goldberg Cohen recommended that Defendants bring a separate lawsuit against Mayborn as part of the Jackel Case and advised that the lawsuit would have to be brought in New York where there was jurisdiction over Mayborn. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

108. Based upon Plaintiff Goldberg Cohen's representations and recommendation, Defendant approved of the filing of the Mayborn Action. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

109. Later, in the Jackel Case, the Louisiana State Court found that Mayborn and Jackel were a single business enterprise and the Mayborn Action was subsequently dismissed pursuant to the settlement with Jackel. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

110. At no time did Defendant consider the Mayborn Action to represent a separate action from the Jackel Case. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

111. Neither Eddie Hakim or Mr. Guerriero recall Plaintiff Goldberg Cohen ever claiming or suggesting that the Mayborn Action was a separate action from the Jackel Case until the dispute arose over Plaintiff Goldberg Cohen's withholding of the $80,000.00 from the Jackel settlement. Hakim Dec., ¶ 7; Guerriero Dec., ¶ 8.

Dated: April 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2017, a true and correct copy of the foregoing document titled "Defendants' Rule 56.1 Counterstatement" was served via the Court's CM/ECF system upon the following counsel for Plaintiffs at the identified email address(es):

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